Supreme Court, U.S.
FILED

No. 00-1498 MAR 28 2001

OFFICE OF THE CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

Ray Sienkiewicz,

*Petitioner,*

v.

John McDougall, individually, and Rod Shoap, as Sheriff of Lee County, Florida, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**1.** Is the United States Supreme Court justified in deviating from normal appellate practice in order to issue a writ of certiorari in a case of imperative public importance requiring immediate determination in this Court where an obvious morass of judicial impropriety exists at both the trial and appellate level ?

**2.** Is the United States Supreme Court justified in deviating from normal appellate practice in order to issue a writ of certiorari to review a case of imperative public importance requiring immediate determination in this Court where the highest officials of the previous federal administration may be guilty of felony murder of a mother at an abortion clinic due to their violations of F.A.C.E. ?

## PARTIES TO THE PROCEEDINGS

**"Petitioner"**

Ray Sienkiewicz

**"Respondents"**

John McDougall, individually, and Rod Shoap,
as Sheriff of Lee County, Florida, et al.

## NOTE TO THE UNITED STATES SUPREME COURT OF RELATED PETITIONS ALREADY FILED WITH THE COURT:

*Meredith T. Raney, Jr. v. Aware Woman Center For Choice, Inc., et al.*, Supreme Court Number 00-1268.

*Jane Roe, II v. Aware Woman Center For Choice, Inc., et al.* Supreme Court Number 00-1301.

*Meredith T. Raney, Jr. v. City of Melbourne, Florida*, Supreme Court number 00-1350.

*Ray Sienkiewicz v. John McDougall, individually, et al.*, Supreme Court number 00-1365.

*Ray Sienkiewicz v. Larry Hart, individually, et al.*, Supreme Court number 00-1419.

## TABLE OF CONTENTS

**Questions Presented** ..... i

**Parties To The Proceeding** ..... ii

**Table of Contents** ..... iii

**Appendix Index** ..... iv

**Table of Citations** ..... v

**Opinions Below** ..... 1

**Statement of Jurisdiction** ..... 1

**Constitutional and Statutory Provisions Involved** ..... 2

**Statement of the Case**

A. **Background** ..... 3

B. **The Proceedings Below** ..... 9

C. **The Related Cases** ..... 10

**Reasons for Granting the Writ**

**First Issue:** ..... 11

**The United States Supreme Court should justify deviation from normal appellate practice and issue a writ of certiorari in a case of imperative public importance requiring immediate determination in this Court where an obvious morass of judicial impropriety exists at both the trial and appellate level.**

**Second Issue** ..... 13

**The United States Supreme Court is justified in deviating from normal appellate practice in order to issue a writ of certiorari to review a case of imperative public importance requiring immediate determination in this Court where the highest officials of the previous federal administration may be guilty of felony murder of a mother at an abortion clinic due to their violations of F.A.C.E.**

**CONCLUSION** ..... 16

**APPENDIX INDEX:**

**Appendix A.** ..... 1a

# TABLE OF CITATIONS

**Cases:** **Page**

*Cheffer v. Reno*, . . . . . 4, 14
55 F.3d 1517 (11th Cir. 1995)

*Doe v. Bolton*, . . . . . 3
35 L Ed 2d 201 (1973)

*In Re Corrugated Container Antitrust Litigation*, 14
614 F.2d 958 (5th Cir. 1980)

*Liteky v. United States* . . . . . 13
114 S.Ct. 1147 (1994)

*Madsen v. Women's Health Center, Inc.*. . . . . 6
114 S.Ct. 2516 (1994)

*Marsh v. Alabama* . . . . . 12
66 S.Ct.276 (1946)

*Raney v. Aware Woman Center For Choice*, . . 8
*Inc.*, M.D. Fla, Case no. 97-1197-19B

*Raney v. Aware Woman Center For Choice*, . . . 13, 14
*Inc.*, 224 F.3d 1266 (11th Cir. 2000)

*Roe v. Wade*, . . . . . 3, 15
35 L.Ed. 2d 147 (1973)

*Schenck v. Pro Choice Network*, . . . . . 4, 12
519 U.S. 357 (1997)

*Stenberg v. Carhart*, . . . . . 15
147 L.Ed. 743 (2000)

**Statutes:**

18 U.S.C. § 248 (F.A.C.E.) . . . . . 1, 2, 14

28 U.S.C. §1254(1) . . . . . 1

28 U.S.C. § 1291 . . . . . 1

28 U.S.C. §1331 . . . . . 1

28 U.S.C. §1343(a)(4) . . . . . 1

28 U.S.C. §1391(b) . . . . . 1

28 U.S.C. §2101(e) . . . . . 1

**United States Constitution**:

Article III, Section 1 . . . . . 13

Article 1, Section 1 and 8 . . . . . 14

Petitioner, Ray Sienkiewicz , respectfully requests that a writ of certiorari be issued to review this case which is filed with the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the District Court in *Robert Smith and Ray Sienkiewicz v. John McDougall, individually, as Sheriff of Lee County, Florida, et al.*, Case number 99-385-CIV-FTM-21 is shown as Appendix A. At this time, there is no opinion from the United States Court of Appeals, Eleventh Circuit.

## STATEMENT OF JURISDICTION

Ray Sienkiewicz filed an action for violation of his civil rights under 18 U.S.C. §248 (Freedom of Access to Clinic Entrances Act) in U.S. District Court, Middle District of Florida, Fort Myers Division pursuant to 28 U.S.C. §1391(b), because the claim arose in that district and also because the defendants reside in that district. There is federal jurisdiction because his claim arises under the laws of the United States according to 28 U.S.C. § 1331. Additionally, since this is an action to recover damages under an Act of Congress providing for the protection of civil rights, jurisdiction was proper in the district court, under 28 U.S.C. §1343(a)(4).

An appeal was taken to the United States Court of Appeals, Eleventh Circuit, under the authority of 28 U.S.C. §1291.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Because judgment has not yet been rendered in the Court of Appeals, Ray Sienkiewicz relies also on 28 U.S.C. §2101(e) for jurisdiction.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III of the United States Constitution, which states in pertinent part:

> Section 1. . The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour .

This case involves the federal statute called Freedom of Access to Clinic Entrances Act, (F.A.C.E.) 18 U.S.C.§ 248, which states in pertinent part:

> (a) **Prohibited activities.** - Whoever -
>
> **(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> (b) **Penalties.** -
>
> . . . and if death results, it shall be for a term of years or for life.
>
> (c) **Civil remedies.** -
>
> **(1) Right of action**.-
>
> **(A) In general.**-Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain services in a facility

that provides reproductive health services . . .

**(e) Definitions.-** As used in this section:

**(1) Facility.-** The term "facility" includes a hospital, clinic, physicians office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

**(5) Reproductive health services.-** The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

## STATEMENT OF THE CASE

### A. Background

After *Roe v. Wade*, 35 L.Ed. 2d 147 (1973) and *Doe v. Bolton*, 35 L.Ed. 2d 201 (1973), became the law of the land, those who opposed these decisions concentrated on legislative efforts to overturn or limit these rulings. This activity involved mostly letter writing to elected officials and to newspaper editors.

Marches and also public demonstrations were held occasionally. During the early years, very little pro-life activity directly affected abortion clinics or the young women receiving abortions there.

In the second half of the 1980's, the rescue movement concentrated on the obstruction of clinic entrances and so prevented young women from receiving any services there. A

few pro-life persons, though, started reaching out to the pregnant girls themselves in a loving, helpful manner. At first, they were called "sidewalk counselors". Later, we will see, the correct description for such courageous people became "referral counselor".

In May, 1994, President William Clinton signed into law the Freedom of Access to Clinic Entrances Act (F.A.C.E.). This law was tailored to make unlawful - as federal crimes - those activities which prevented pregnant women from receiving "reproductive health services". Counseling and referral assistance were specifically included as F.A.C.E.-protected services.

Within a year, the validity of F.A.C.E. was challenged in the federal courts. A key test case was brought against Janet Reno as United States Attorney General and Charles Wilson, then a U. S. Attorney, in the Middle District of Florida. In this case, *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), Reno and Wilson convinced both the district court and the U.S. Court of Appeals, Eleventh Circuit, that F.A.C.E. was a valid exercise by Congress of its commerce clause powers.

Thus sidewalks leading to abortion clinic doorways were part of interstate commerce; such sidewalks have at least limited *forum* opportunities. (A later Supreme Court decision provided pro-life counselors with behavioral guidelines while on the sidewalk near abortion clinic entrances. This was *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997).)

With protests and rescues fading from the post-F.A.C.E. abortion clinic scene, some concerned, conscientious pro-lifers analyzed the whole legal spectrum of congressional legislation and Supreme Court decisions relating to abortion in an effort to operate within the law, henceforward protected by

the federal authorities.

In Lee County, Florida, pro-life counselors provided then-Sheriff John McDougall with the pertinent acts and decisions. They explained to the Sheriff that they were legally entitled to provide their services in the Azima abortion facility, protected by F.A.C.E. There was no objection from the Sheriff. Nor was there ever any legal action against the counselors attempted by Dr. Azima.

After pro-life referral counselors began working in the Azima facility in May, 1997, word of their success began spreading around the country. At first, the pro-life community was skeptical that the federal authorities would obey the law of the land if it meant that fewer abortions would be performed.

For two years, these pro-life referral counselors were not hindered in their loving assistance to the girls brought to the Azima clinic. Many of the young women were not aware that they were expected to obtain an abortion. Many did not know that the Lee County Medical Society had been warning customers of the Azima clinic to be tested for AIDS because Azima was reportedly not sterilizing his instruments between abortions.

And, one morning, a counselor was required to intercede for a young woman being chased around her car in the parking lot by Dr. Azima; she claimed that he was angry because she refused to get an abortion after learning that her tests showed that she was pregnant.

Referral counseling training with course completion certificates were obtained by all pro-life counselors at Azima's. They all joined a professional counseling organization with stringent standards of behavior. The

information which they provided to interested women concerned not only the dangers at the Azima clinic but also the resources and alternative services in the local area for women dealing with crisis pregnancies.

Smiles and gentle expressions were the pro-life counselors' stock in trade. There were no bullhorns, signs, shouting or debate by these counselors. Conversations took place in soft tones and whispers. Such is the way of discussing death threats, rape and incest - particularly when the guilty person is nearby. So also are conversations about other embarrassing topics, such as AIDS and venereal diseases, normally very quiet and private.

The counselors' presence and information were essential to the well-being of the young women: no clinic worker would tell them about the instruments left unsterilized between abortions, about forced abortions, the likelihood of AIDS, or other threats to life and health, much less alternative life-saving resources available nearby.

On the other side of Florida, a pro-life counselor had sued the infamous Aware Woman Center For Choice, site of the injunction in *Madsen Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994), for violation of his F.A.C.E.-protected rights.

However, the district judge refused to dismiss that complaint in December, 1997 which started the abortion industry worrying about this particular case. It reacted by urging the Aware Woman Center For Choice to add the legendary Roy Lucas to its legal battery. Several months of intensive motion and discovery practice followed the entry of Mr. Lucas into the case.

The following December, after the failure of Roy

Lucas to obtain a summary judgment for Aware Woman, the abortion industry sounded its call for "battle stations": the big guns in the federal administration were going to be called upon to stop the pro-life counselors.

The economic threat to the abortion industry was enormous. While the cost of hiring armed bullies from local police stations may have been several hundred dollars per week for a clinic such as Aware Woman, this expense had prevented pro-life referral counselors from effectively reaching the non-consensual recipients of abortion who were the most receptive to their help and alternative services.

Depending on one's definition of "non-consensual", the estimates run from a minimum of 30% to a maximum in excess of 70% of all abortions. Thus at Aware Woman Center For Choice, the interference with the counselors by the hired police was paid for by the sale of no more than two extra abortions each week.

Nationwide, the 30% to 70% range in non-consensual abortions translated into more than 400,000 to nearly 1,000,000 of the total abortions done annually in this country. Any significant reduction in these numbers, which would be readily obtained by pro-life referral counselors working lovingly and lawfully at all of the abortion clinics, could collectively cost the abortion industry hundreds of millions of dollars. There was good financial reason for its excessive concern about the future of pro-life referral counseling programs.

Reportedly, the former U.S. Attorney General, Janet Reno, asked Charles Wilson to determine whether the counselors were violating some federal law so that they could be stopped. After studying the situation, he responded that the counselors were breaking no law.

The abortion industry began to breathe easier on February 26, 1999. Earlier that week, Roy Lucas had entered a local hospital claiming a sudden debilitating illness which would preclude his appearance at trial on Monday, March 1 of the Aware Woman case. He had been begging the court for a continuance of the trial. On Friday afternoon, the 26th, the district judge granted her own motion for a summary judgment, ruling that the counselor could not possibly prove that the hired guard-dog police in Melbourne were agents of Aware Woman.

By May, 1999, the plan to stop the counselors was approved by William Clinton, Janet Reno, and Charles Wilson. It was modeled on the February 26 decision in *Raney v. Aware Woman Center For Choice, Inc.*, District Court number 97-1197-CIV-ORL-19B. Local police would be used as unwitting pawns to unlawfully intimidate the counselors. As soon as Charles Wilson had his "deal worked out", the pro-life counselors at the Azima clinic would be threatened with arrest.

Until then, they were told by Sheriff McDougall, these referral counselors were free to carry on their work in the Azima facility as they had been doing with his blessing for the previous two years. In turn, McDougall was promised that he would be sued for such F.A.C.E. violations, when and if such interference occurred.

It was not until two months later that the counselors learned that this "deal", which would trigger the F.A.C.E. violations, was the appointment of Wilson to an appellate judgship. By July, Clinton, Reno and Wilson knew that Wilson would be appointed to the United States Court of Appeals, the Eleventh Circuit. The initial episode - the trial run - of counselor intimidation then started at Azima's. It resulted in this civil action.

Later, this same tactic would be used by U.S. Attorneys around the nation who would corruptly convince local police to serve local abortion clinics as the bullies to threaten pro-life counselors, thus unlawfully preventing their providing of referral services in abortion facilities. Not only would the abortion industry save on the cost of hiring these mercenaries, there was little chance that numerous non-consenting girls would now be helped to escape the abortionists.

**B. The Proceedings Below**

Shortly after the promised F.A.C.E. violations took place in Azima's facility, Ray Sienkiewicz and another referral counselor filed this civil action against John McDougall, individually and as Sheriff of Lee County, Florida. Also joined were John Doe and Jane Doe, the top federal officials who procured this wrongdoing.

McDougall responded with a motion to dismiss which was opposed by the counselors.

Several months later, the counselors' attorney received an anonymous communication alleging impropriety on the part of the magistrate assigned to the case. About that same time, McDougall's attorney requested that the magistrate be allowed to try the case. After that request was turned down by the counselors, the magistrate recommended to the district judge that the case be dismissed.

When the magistrate thereafter refused to disqualify himself, an appeal was taken to the U.S. Court of Appeals, Eleventh Circuit, partly on the grounds that the Court of Appeals had the inherent authority to prevent the appearance of impropriety in the district court.

In the meantime, the District Judge adopted the recommendations of the magistrate and ordered the case dismissed. Timely appeal of that decision was also taken to the Court of Appeals.

The Court of Appeals was notified of the death in late August of a mother in Lee County, Florida. According to media reports, she was killed by a reaction to anesthesia administered by Dr. Azima during an abortion in his office. The Florida Board of Medicine had banned the use of spinal or general anesthesia in office surgery three weeks earlier. Ray Sienkiewicz stated his belief that this woman had been killed during a F.A.C.E. violation and that the punishment could include life in prison; that possible defendants included a judge of that court, the President, and the Attorney General.

Since that time, the Court of Appeals has been fully briefed on both appeals. It dismissed the one seeking review of the magistrate's refusal to disqualify himself; it has taken no action on the second appeal.

Petition for writ of certiorari was filed with the Supreme Court seeking review of the decree in the earlier McDougall appeal. That is Supreme Court number 00-1365.

**C. The Related Cases**

*Meredith T. Raney, Jr. v. Aware Woman Center For Choice, Inc., et al.*, Supreme Court number 00-1268, concerns a F.A.C.E. violation action by a pro-life counselor where the Court of Appeals rewrote F.A.C.E., apparently to exonerate the powerful persons referred to in this present case.

*Meredith T. Raney, Jr. v. City of Melbourne, Florida*, Supreme Court number 00-1350, was brought after the district court ruled that as a matter of law the Melbourne

City Police were not instruments of Aware Woman Center For Choice. As a collateral question, the Court of Appeals was asked about the effect of a possible "blackmail database" maintained by the national abortion industry.

*Jane Roe, II v. Aware Woman Center For Choice, Inc. et al.*, Supreme Court number 00-1301, concerns a young woman who changed her mind about an abortion but was brutally held down by four clinic workers. The abortionist then proceeded to jab violently through her vagina, shredding her uterus and colon, and killing, but not removing, the unborn child. Jane Roe, II was prevented from receiving the help she needed from the rescue squad there in the Aware Woman facility and from being taken to a local emergency room. The district judge tried to strip Jane Roe, II of her anonymity.

*Ray Sienkiewicz v. John McDougall, et. al.*, Supreme Court number 00-1365, concerns the economic relationship between the defendant and the magistrate assigned to this case; the Court of Appeals refused to exercise its inherent authority to avoid the appearance of impropriety.

*Ray Sienkiewicz v. Larry Hart, et al.*, Supreme Court number 00-1419, is a companion case to the present petition. Clinton, Reno and Wilson are appellees/ respondents.

## REASONS FOR GRANTING THE WRIT

### I

**The United States Supreme Court is justified in deviating from normal appellate practice in order to issue a writ of certiorari in a case of imperative public importance requiring immediate determination in this Court where an obvious morass of judicial impropriety exists at both the trial and appellate level.**

This case is of great public importance because

somewhere between 400,000 and 1,000,000 girls and young women may be receiving non-consensual abortions each year. Their main source of help, the pro-life referral counselors who seek to operate in abortion facilities, have been unlawfully prevented from doing so.

There is no real question that these pro-life counselors are legally entitled to provide F.A.C.E.-defined services in abortion facilities. We have a longstanding heritage of providing *forum* opportunities on sidewalks placed in interstate commerce. Decisions of the United States Supreme Court in cases such as *Marsh v. Alabama*, 66 S.Ct. 276 (1946), have confirmed this right.

More recently, this Court approved a set of standards governing the appropriate behavior of pro-life counselors operating at the entrances to abortion clinics. *Schenck v. Pro Choice Network, (supra)*. When complying with these standards in a loving and lawful manner, the pro-life referral counselors must be protected under F.A.C.E., not so much for their own benefit, but in order to safeguard young women such as Jane Roe, II or the mother who was apparently murdered in North Ft. Myers, Florida last August.

The district judge in this case did not follow the law. Worse, he adopted the magistrate's report which contained the dishonest statement that the counselors were operating "outside" the facility. The counselors had been careful to define the physical dimension of the Azima facility and have shown that they were unlawfully prevented from providing desperately needed referral and counseling services within the boundaries of this facility.

To add insult to a grievous legal injury, the district judge engaged in unwarranted name-calling, saying that the counselors were **insinuating** their way into the facility in order

to **confront** people. This was not true. Such sarcasm and dishonesty is well below the level of "good Behaviour" required by our Constitution. (Article III, Section 1)

Based on its decision in *Raney v. Aware Woman Center For Choice, Inc.*, 224 F.3d 1266 (11th Cir. 2000), the Court of Appeals cannot be expected to remedy this horrible situation in a case where a member of that court appears to be involved in a nationwide program of F.A.C.E. violations, one of which has reportedly resulted in a felony murder.

This morass of impropriety, real or apparent, can only be resolved by the United States Supreme Court in accord with the judicial stance taken in *Liteky v. United States*, 114 S.Ct. 1147 (1994).

## II

**The United States Supreme Court is justified in deviating from normal appellate practice in order to issue a writ of certiorari to review a case of imperative public importance requiring immediate determination in this Court where the highest officials of the previous federal administration may be guilty of felony murder of a mother at an abortion clinic due to their violations of F.A.C.E.**

A policeman wearing his badge and gun who walks into your store and tells you that he will arrest you for trespassing if you do not give him all the money in the cash register is nothing but a gutter gangster. The same label can be applied to those policemen who were used by the respondents to threaten and intimidate the counselors in this and in the related cases.

These hoodlums - policemen were working for the most politically powerful people in this nation when they prevented the referral counselors from providing information

about the slovenly practices of Dr. Azima, which had been reported to them. Ray Sienkiewicz believes that the woman who was supposedly killed by Dr. Azima's misuse of anesthesia in late August, 2000 died as a result of the F.A.C.E. violations. In accord with 18 U.S.C. §248(b), the punishment for this felony murder would be a maximum of life in prison.

William Clinton, an attorney, signed 18 U.S.C. §248 (F.A.C.E.) into law in May, 1994. Janet Reno, an attorney, and Charles Wilson, an attorney, convinced the United States Court of Appeals, Eleventh Circuit, that 18 U.S.C. §248 (F.A.C.E.) was constitutional. *Cheffer v. Reno* (*supra*). All of these attorneys knew, or should have known, the criminal consequences should they cause the death of another human being while committing violations of F.A.C.E.

A reasonable, well-informed observer can believe that these powerful people have been responsible for a panel decision at the Court of Appeals which constituted a wholesale revision of 18 U.S.C. §248 (F.A.C.E.), in violation of Article I, Section 1 and 8, U.S. Constitution, as was apparently done in *Raney v. Aware Woman Center For Choice, Inc.* (*supra*).

There is at least the appearance that the highest executive officer of this nation, and those working in concert with him, successfully controlled some of the decisions in this and related cases. There is, then, the need to avoid any further improper appearance in the federal courts of the Eleventh Circuit. Procedural rules should be suspended to accomplish that goal without further delay.

The case of *In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980) provides that the appearance of justice is more important than the question of appealability of a case when the national stakes are high. Ray Sienkiewicz believes that although this case is obviously not

precedent, its concept should apply to the situation at hand.

Ray Sienkiewicz has acknowledged the importance of the lives and health of pregnant women as emphasized by this Court in its abortion decisions starting with *Roe v. Wade*, (*supra*) and continuing down to *Stenberg v. Carhart*, 147 L.Ed. 743 (2000).

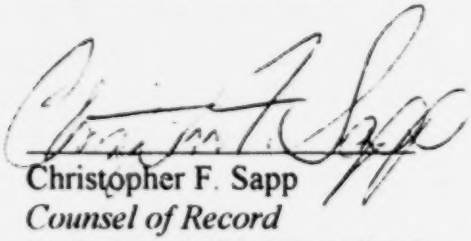
As a trained, referral counselor, Ray Sienkiewicz should have been at his post by the Azima doorway where the murdered mother could have been warned that her life and health were seriously at risk inside; that an underpaid veterinarian would likely provide a higher level of medical care to a stray cur than she would be given. He believes that her death unlawfully resulted from one of the many F.A.C.E. violations which are the subject of this petition.

## CONCLUSION

Ray Sienkiewicz prays that the United States Supreme Court will issue a writ of certiorari to review this case: it represents unprecedented evil where our highest officials have traded political or economic advantage at the expense of the lives and health of millions of pregnant young women. Their lives and health and, additionally, judicial integrity and propriety must never be allowed to become commodities with which the politically powerful barter for their own selfish gain.

Unless this Court acts, more young women will be maimed and mutilated; more young women will be murdered.

Respectfully submitted,



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## APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION
(filed July 10, 2000)
Case No. 2:99-cv-385-FtM-21D

ROBERT SMITH, et al.,
Plaintiff,

v.

JOHN MCDOUGALL, individually and
as Sheriff of Lee County, Florida, et al.,
Defendants.

/

**ORDER**

This cause came on consideration of Defendant's Motion to Dismiss (Dkt. 5). This matter was considered by the Magistrate Judge, pursuant to the general order of assignment, who has filed a report recommending that the case be dismissed. The court has considered the Report and Recommendation (Dkt. 13) of the Magistrate Judge, the objections thereto (Dkt. 15), and the applicable authorities.

Plaintiffs purport to base their claims exclusively on the Freedom of Access to Clinic Entrances Act ("the Act"). Plaintiffs are patently not encompassed within the category of persons authorized by the Act to assert claims thereunder. Even assuming the services Plaintiffs were providing fall within the meaning of "reproductive health services" under 18 U.S.C. §248(e)(5), a right of action under the Act most certainly does not extend to "sidewalk counselors" who have no nexus or relationship with the facility[1] but nevertheless seek

to insinuate themselves into a facility so that they can provide counseling to those they seek to confront. Such is certainly not within either the language or the spirit of the Act.

The Court agrees with the analysis, findings, and conclusions of the Report and Recommendation and will adopt the same as the Court's own.

Upon consideration of the foregoing, it is hereby **ORDERED:**

1. The Plaintiffs' objections to the Magistrate Judge's Report and Recommendation are overruled and the said Report and Recommendation is hereby adopted by the Court.

2. Defendant's Motion to Dismiss (Dkt. 5) is **GRANTED** and the Plaintiffs' Complaint is dismissed.

3. The Clerk is **DIRECTED** to close this file.

**DONE AND ORDERED,** at Jacksonville, Florida, this 7th day of July, 2000.

/s/
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record, Pro se party, if any, Courtroom Deputy Clerk, Judicial Assistant, Law Clerk

---

[1]Section 248(e)(1) defines "facility" as follows:

> (e) **Definitions**. - As used in this section:
>
> > **(1) Facility.** - The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Supreme Court, U.S.
FILED

001498 MAR 28 2001

OFFICE OF THE CLERK

No. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

Ray Sienkiewicz,

*Petitioner,*

v.

John McDougall, individually, and Rod Shoap, as Sheriff of Lee County, Florida, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## SUPPLEMENTAL APPENDIX

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## INDEX TO SUPPLEMENTAL APPENDIX

**Report and Recommendation of ..... 1a**
**Magistrate Judge, filed April 28, 2000**

**Docketing letter from the United States Court .. 7a**
**of Appeals, Eleventh Circuit, dated**
**August 7, 2000**

## SUPPLEMENTAL APPENDIX

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**FT. MYERS DIVISION**
(filed: April 28, 2000)

**ROBERT SMITH, ET AL.,**
**Plaintiffs,**

**-vs-** **Case No. 2:99-cv-385-FtM-21D**

**JOHN MCDOUGALL, INDIVIDUALLY AND AS SHERIFF OF LEE COUNTY, FLORIDA, et al.,[1]**
**Defendants.**

**REPORT AND RECOMMENDATION**

**TO THE UNITED STATES DISTRICT COURT**

This cause came on for consideration without oral argument on the following motion filed herein:

**MOTION: MOTION TO DISMISS (Doc. No. 5)**
**FILED: September 7, 1999**

**THEREON it is RECOMMENDED that the motion be GRANTED**

[1]In the caption of the Complaint, the Plaintiffs list John McDougall, individually and as Sheriff and then "et al" after the Sheriff. The Plaintiffs fail to list who the other defendants are in this case, although at times, the Plaintiffs do refer to a John or Jane Doe but no service appears to be affected on these individuals.

This action was filed pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §248. The Defendant argues that the Complaint fails to state a cause of action under 18 U.S.C. §248 in that it does not provide a civil remedy for the Plaintiffs' allegations. The Plaintiffs respond that 18 U.S.C. §248 protects them and that the Defendant violated the statute.

**FACTS**[2]

Southwest Florida Women's Clinic ("Clinic") is located in a privately owned strip shopping center, which includes a parking lot and sidewalk. (Com.[3]¶11) Abortions are performed at the Clinic. (Com.¶11) Plaintiffs Robert Smith and Ray Sienkiewicz aver that they are "sidewalk counselors" outside of the Clinic and do not allege that they are affiliated with the Clinic. (Com.¶7, 10, 12) "Sidewalk counselors" offer "love and help" and allegedly reproductive health services at abortion clinics. (Com.¶7) On July 13, 1999, Plaintiffs were using a "reasonable portion of the sidewalk and parking lot" to provide reproductive health services such as "counseling of women and men as to the spiritual, moral, medical, physical and psychological health aspects of adoption, and abortion; the nature of this particular facility; the problems and risks associated with this particular facility; determining the needs of the individuals approaching or leaving the facility; and, offering written and verbal referral information to other related care-givers." (Com.¶12) Plaintiffs claimed that they were threatened and intimidated by the Defendant John McDougall through his deputies and equipment. (Com.¶13) The threats and intimidation were

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[2]The facts asserted by the Plaintiffs in their Complaint (Doc. 1) are taken as true for the purposes of this Motion to Dismiss only.

[3] "Com" refers to the Complaint (Doc. 1)

comprised of Sheriff McDougall ordering his deputies to threaten the Plaintiffs with physical removal from the facility. (Com.¶14) The Plaintiffs are in fear that Sheriff McDougall, through his deputies, will physically harm them. (Com.¶15)

**STANDARD FOR MOTION TO DISMISS**

A complaint should not be dismissed on the ground that the plaintiff's complaint failed to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"
*Jones v. Board of Commissioners of the Alabama State Bar*, 737 F.2d 996 (11th Cir. 1984) citing *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation*, 711 F.2d 989 (11th Cir. 1983) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d80 (1957). "A trial court, in ruling on a motion to dismiss, is required to view the complaint in a light most favorable to the Plaintiff." *Sofarelli v. Pinellas County*, 931 F.2d 718, 721 (11th Cir. 1991). Although the Court must take the allegation in a complaint as true when reviewing motions to dismiss, it is not permitted to read into the complaint facts that are not there. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 2944-45, 92 L.Ed. 2d 209 (1986), *Beck v. Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is, as we have stated previously, 'exceedingly low.'" *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) citing *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation* 711 F.2d 989, 995 (11th Cir. 1983).

**ANALYSIS**

The Defendant argues that the Plaintiffs' allegations of intimidation by law enforcement officers are not a violation of FACE on the grounds that the Plaintiffs were not in a facility and did not provide reproductive health services. The Plaintiffs respond that the definition of "facility" in the statute should include those outside of the facility and that their counseling was providing individuals with reproductive health services. The purpose of FACE is to "protect and promote the public safety and health services . . . [of] persons seeking to obtain or provide reproductive health services." 18 U.S.C. §248, "Congressional Statement of Purpose" FACE provides in part as follow:

> **(a) Prohibited activities.** - Whoever-
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> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services: . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection(c) . . .
>
> **(c) Civil remedies.** -
>
> **(1)Right of action.** -
>
> **(A) In general.** - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . .
>
> **(e) Definitions.** - As used in this section:
>
> **(1) Facility.** - The term "facility" includes a

> hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located . . .
>
> **(5) Reproductive health services.** - The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

18 U.S.C. §248 (emphasis added) The Plaintiffs allege that they were providing reproductive health services pursuant to 18 U.S.C. §248(a)(1) The Court will assume for the purposes of this Motion to Dismiss that the services the Plaintiffs were providing may be considered reproductive health services as defined in 18 U.S.C. §248(e)(5) on the grounds that the Plaintiffs claim that they provided medical and physical counseling. For protection under FACE, however, the Plaintiffs must show that they were providing their services "in a facility." The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services. The Plaintiffs claim that they are "sidewalk counselors" and do not claim to be counseling in a facility, but rather outside the Clinic (which is not the Plaintiff's facility). It is undisputed that the Plaintiffs were not inside the Clinic when providing their counseling. The Court does agree with the Plaintiffs that FACE applies equally to pro-life advocates as well as pro-choice advocates as evidenced in the case of *Greenhut v. Hand*, 996 F.Supp 372 (D.N.J., 1998). However, in *Greenhunt*, the pro-life association was in a facility of its own. *Id.* at 374. The Court will not expand the definition to include the grounds surrounding a facility totally

unrelated to the Plaintiffs. Therefore, the Court finds that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Therefore, it is respectfully recommended that the Motion to Dismiss (Doc.5) be granted and this case dismissed.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Chambers in Ft. Myers, Florida.

**DATED:** April 28th, 2000

/s/
DOUGLAS N. FRAZIER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Parties

**United States Court of Appeals**
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Thomas K. Kahn**
Clerk

In replying Give Number
Of Case and Names of Parties

August 07, 2000

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-13805-II Robert Smith v. John McDougall
DC DKT NO.: 99-00385 CV-FTM-21D

**THIS APPEAL IS GOVERNED BY MORE STRINGENT PROCEDURES FOR REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS AND RECORD EXCERPTS IN CIVIL APPEALS. NEW PROCEDURES ALSO PROVIDE FOR DISMISSAL WITHOUT FURTHER NOTICE IN CIVIL APPEALS WHEN A BRIEF OR RECORD EXCERPTS IS NOT FILED OR CORRECTED WITHIN TIME PERMITTED. PLEASE SEE ENCLOSED NOTICE AND REVISED RULES.**

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF AND RECORD EXCERPTS BE SERVED AND FILED WITHIN FORTY ( 40) DAYS FROM July 21, 2000.

The above date is the date the appeal was docketed in the court of appeals, as provided by the 11th Cir. R.12-1.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS. See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules, for further information on preparing briefs and record excerpts. Motions for extensions of time to file a brief are frowned upon by the court.

A current copy of the district court docket sheet, which shows papers comprising the record, is available from the district clerk. Counsel or parties are requested to use the district court docket sheet and their own file copies of court papers in preparing the brief and record excerpts. Counsel or parties may also review the record at the office of the district court clerk. Please refer to the enclosed sheet for information on referencing the record. Upon notice that all appellees' briefs have been filed, the record will be promptly sent to this office by the district court clerk.

Sincerely,

THOMAS K. KAHN, Clerk

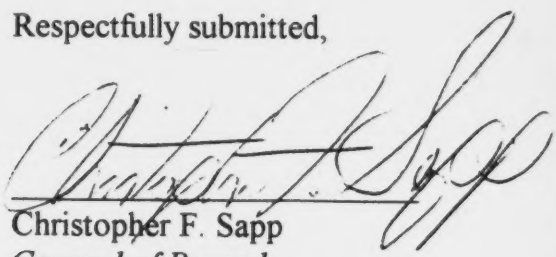
Reply To: Tonya Dumas (404)335-6178

Encl.

BR-1 (1-2000)

The foregoing appendices are hereby submitted as a supplement to the Petition For Writ Of Certiorari.

Respectfully submitted,



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